IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1940

No.

R. P. FARNSWORTH & COMPANY, INC.,
Petitioner,

versus

ELECTRICAL SUPPLY COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURT BELOW.

The Judge of the United States District Court for the Eastern District of Louisiana rendered no opinion. He overruled petitioner's motion for a directed verdict and granted respondent's motion for a directed verdict (R. 217, 262). The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 281) is reported in the *112 Fed. (2d) 150.* The opinion of the Circuit Court of Appeals denying the motion for a rehearing (R. 295) was filed July 2nd, 1940, not reported.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240a of the Judicial Code as amended, *28 U. S. C. A., Section 347.*

2. The date of the judgment to be reviewed, namely, the judgment of the Circuit Court of Appeals for the Fifth Circuit, is July 2nd, 1940, the date on which the motion for a rehearing was denied.

3. This case involves the interpretation of the Act of Congress approved August 13, 1894, *28 Stat. at L. 278, Chap. 280*, as amended, *40 U. S. C. A., Sec. 270*, known as the "Hurd Act". Said statute allows persons supplying labor or material to contractors or sub-contractors of contractors upon public buildings to bring suit upon the contractor's bond provided that such suit be commenced "within one year after the performance and final settlement of said contract, and not later."

4. The Circuit Court of Appeals for the Fifth Circuit held that the date upon which "performance and final settlement" was determined was July 28, 1934, when the Director of Procurement reviewed and checked the record, and recommended *the payment* of the balance due of $82.80 and not upon July 2, 1932, the date upon which the Administrative Department having charge of the work found that the contract was completed, approved the work and *determined the amount due* by the United States to the contractor and directed said amount to be paid it less $82.80 which was retained as sufficient to protect the government's interest. The case is, therefore, now reviewable by your Honorable Court upon writ of certiorari pursuant to Section 240a of the Judicial Code as aforesaid.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under the heading "A" in the petition for certiorari and in the

interest of brevity the statement is not repeated at this point.

In verification of that statement and in order that this Court may have a clear conception of why the $82.80 was retained by the government, we quote this excerpt from Circuit Judge McCord's opinion:

> "Farnsworth's contract called for the construction of a $1,178,000.00 building on the Marine Hospital Grounds. The record shows that the contract was completed within the agreed time and the letter from the Assistant Secretary of the Treasury on July 2, 1932, recited this fact. The letter further stated, 'There is a balance due you under this contract of $4,332.80. You will be paid at this time on account of your said contract the sum of four thousand two hundred fifty dollars ($4,250), the balance retained ($82.80), being considered sufficient to protect the Government's interests pending final settlement of your contract.'
>
> "Farnsworth had removed a portion of a brick wall on the hospital grounds to make a driveway to facilitate the moving of materials to the work site. The record shows that the $82.80 referred to in the letter of July 2, 1932, was retained by the Government to take care of the cost of replacing the brick wall in the event Farnsworth did not do so. This small sum was not being withheld pending final settlement of the $1,178,000 contract. Final settlement was in all things consummated as shown by the letter. The opening in the wall was being kept open by the contractor to move materials to another building which was being constructed by him

and under another and different contract from the one here under consideration. The Government, through duly authorized channels, determined the final balance due Farnsworth on the contract on July 2, 1932. . . ." (R. 287)

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Fifth Circuit erred in not ordering plaintiff's suit dismissed because it was filed too late.

2. The Circuit Court of appeals for the Fifth Circuit erred in not holding that the date of "performance and final settlement" was July 2, 1932, the date upon which the Assistant Secretary of the Treasury found that the contract had been completed and determined the balance due the contractor.

3. The Circuit Court of Appeals for the Fifth Circuit erred in holding that the date of performance and final settlement was the date upon which the Director of Procurement checked and reviewed the record (which was in the General Accounting Office) and recommended the payment of the $82.80.

4. The Circuit Court of Appeals for the Fifth Circuit erred in holding "not until the wall was rebuilt and the order passed to pay the $82.80 was there a final settlement of the contract" and also in holding "so long as the United States contend that the contractor must do something more and is holding back an amount, large or small, to secure full performance there is no final settlement of the contract."

5. The Circuit Court of Appeals for the Fifth Circuit erred in holding that the present suit was brought

within one year after the performance and final settlement of the contract.

V.

ARGUMENT.

Point A. The decision below is contrary to and in conflict with the decisions of this court in *Illinois Surety Company v. United States to the Use of J. A. Peeler, et al., 240 U. S. 214*, and *Globe Indemnity Company v. United States, 291 U. S. 476.*

Point B. The decision below is in conflict with the decisions of the Courts of Appeals for the Second, Third, Fourth, Sixth, Eighth and Ninth Circuits.

POINT A.

The decision below is contrary to and in conflict with the decisions of this Court in *Illinois Surety Company v. United States to the Use of J. A. Peeler, et al., 240 U. S. 214*, and *Globe Indemnity Company v. United States, 291 U. S. 476.*

In *Illinois Surety Company v. United States to the Use of J. A. Peeler, et al., 240 U. S. 214* (known as the Peeler case), it appears that the work under the contract was completed and on August 21, 1912, the Treasury Department, which was the Department in charge of the construction, "stated and determined the final balance" to be paid to the contractor. Payment was made on September 11, 1912, and suit was brought on March 4, 1913. Both of the courts below entered judgment in favor of the plaintiff and the surety brought the case to this court upon writ of error on the theory that performance and final settle-

ment took place September 11, 1912, and consequently that the suit was brought within six months of the date of performance and final settlement and was therefore premature. This court held that performance and final settlement took place on August 21, 1912, the date on which the Treasury Department, which was the Department in charge of the construction of the building, stated and determined the final balance due to the contractor. Consequently, the suit was not brought within six months of performance and final settlement and was not premature. At *pages 218-219*, Mr. Justice Hughes said:

> "The pivotal words are not 'final payment' but 'final settlement,' and in view of the significance of the latter term in administrative practice, it is hardly likely that it would have been used had it been intended to denote payment."

On *page 221* of said same decision, the Justice said:

> ". . . it is apparent that the word 'settlement' in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well-defined meaning as denoting the appropriate administrative determination with respect to the amount due. We think that the words 'final settlement' in the act of 1905 had reference to the time of this determination when, so far as the government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority. It is manifestly of the utmost importance that there should be no uncertainty in the

time from which the six months' period runs. The time of the final administrative determination of the amount due is a definite time, fixed by public record and readily ascertained."

In the case of *Globe Indemnity Company v. U. S., etc., 291 U. S. 476, 481*, this Court, in the course of its opinion, after referring to the *Peeler* case, above quoted, and in reference to same said:

". . . The issue presented was whether suit by a sub-contractor upon a bond given under the Hurd Act was premature when begun six months after the date of the Department's determination, but less than six months after payment. It was held that it was not; that the term 'final settlement' in the Hurd Act was not intended to denote payment, but had been used to describe an administrative determination of the amount due upon completion of the contract. Similar determinations made by other departments before the enactment of the Budget and Accounting Act have repeatedly been held to constitute final settlement within the meaning of the Hurd Act."

Applying the above tests as enunciated in the foregoing deisions to the issue at bar, it will be seen that the letter of the Assistant Secretary of the Treasury, of date July 2, 1932, met the test and was the date of "final settlement" under the Hurd Act.

Under these decisions this Court holds final settlement as used in the Hurd Act does not mean final payment, but means the final determination by the proper Governmental Authority of the amount which the Government is finally bound to pay. The Assistant Secretary of

the Treasury was the proper Governmental Authority to make the determination of the amount due petitioner under this contract. He made the unconditional and final ascertainment that the balance due was $4332.80. He directed that $4250.00 be paid, and he determined that the $82.80 balance which was directed to be retained was sufficient to protect the government.

As a matter of fact, it made no difference whether the amount determined to be due was ever paid, as "final settlement" took place the moment the amount due Farnsworth was determined.

There is no decision by this court or any Circuit Court of Appeals in any of the Circuits which holds that the term "final settlement", as used in the Hurd Act, is determined by the test fixed by the Circuit Court of Appeals for the Fifth Circuit in this case.

POINT B.

The decision below is in conflict with the decisions of the Courts of Appeals for the Second, Third, Fourth, Sixth, Eighth and Ninth Circuits.

1. The decision of the lower court is in conflict with the decisions of the Circuit Courts of Appeals for the respective circuits, above referred to, in that in all of their decisions they hold that the *sole and only test* of the date of final settlement under the Hurd Act is when, upon the completion of the contract, an administrative determination by the proper governmental authority of the amount due the contractor by the government or by the contractor to the government has been made.

In the case of *Consolidated Indemnity and Insurance Co. v. W. A. Smoot & Co., 57 F. (2d) 995*, the Circuit

Court of Appeals for the Fourth Circuit had before it a case for decision in which the facts were in effect identical with the facts in the present case. The case is particularly applicable because when the administrative officer of the government made the determination of the amount due by the government, he directed that $39.69 be withheld awaiting "final adjustment". It was contended that because of this retention there was no final settlement. On page 996, Headnote 1, the Court said:

> ". . . Final settlement as used in the Hurd Act does not mean final payment. 'It means the final determination by the proper governmental authority of the amount which the government is finally bound to pay or entitled to receive under the contract.' U. S., to Use of Stallings, v. Starr (C. C. A. 4th) 20 F. (2d) 803, 806; Illinois Surety Co. vs. United States, 240 U. S. 214, 36 S. Ct. 321, 60 L. Ed. 609; Arnold vs. U. S. (C. C. A. 4th) 280 F. 338; U. S. to Use of Union Gas Engine Co. v. Newport Shipbuilding Corporation (C. C. A. 4th) 18 F. (2d) 556. As said by the Circuit Court of Appeals for the Second Circuit in U. S. ex rel. Brown-Ketcham Iron Works v. Robinson, 214 F. 38, 40: 'In determining the time when materialmen may begin suit, it would not do to fix it at some day "after complete performance" merely. Defective work, damages for delay, and other matters might give the United States some claim which it might not decide to prosecute until some time after the work was turned over, apparently complete. The date was, therefore, fixed relatively to "complete performance of the contract and *final settlement thereof.*" We take it

> that these italicized words refer to the time when the proper government officer, who has the final discretion in such matters, after examination of the facts, satisfies himself that the government will accept the work, as it is, without making any claim against the contractor for unfinished or imperfect work, damages for delay or what not, and records that decision in some orderly way'."

The following cases in the Second, Third, Fourth, Sixth, Eighth and Ninth Circuits all hold that the term "final settlement" as used in the Hurd Act means an administrative determination of *the amount due* upon the completion of the contract.

U. S. to Use of Stallings, et als., v. Starr, et als., 20 F. (2d) 803, 806, 807, Headnote 6-8 (C. C. A. 4th); *Arnold v. U. S.*, 280 F. 338, 341, 342 (C. C. A. 4th); *United States Fidelity & Guaranty Co. v. U. S.*, 65 F. (2d) 639, 642 (C. C. A. 9th); *H. G. Christman Co., et al., v. Michigan Gypsum Co., et al.*, 85 F. (2d) 474, 476, 477 (C. C. A. 8th); *Fidelity & Casualty Co. of New York v. United States for Benefit of Daugherty, et al.*, 70 F. (2d) 895, 896, 897 (C. C. A. 6th); *National Surety Corporation v. Reynolds*, 87 F. (2d) 865, 867 (C. C. A. 8th); *Antrim Lumber Co. v. Hannan, et al.*, 18 F. (2d) 548, 549 (C. C. A. 8th); *United States v. Thomas Earle & Sons*, 99 F. (2d) 898 (C. C. A. 3rd); *Robinson v. U. S.*, 251 F. 461 (C. C. A. 2d); *U. S. v. Newport News Shipbuilding Co.*, 18 F. (2d) 556 (C. C. A. 4th); and *U. S. v. Arthur Storm Co.*, 101 F. (2d) 524 (C. C. A. 6th).

An examination of these cases will show the decision of the lower court is in conflict with all of the above decisions.

We have not quoted from these decisions, but, for convenience of the Court, have given the title of the case, volume, page and the exact page applicable to the point at issue.

2. The lower court in the opinion denying a rehearing (R. 295), held:

> ". . . So long as the United States contend that the contractor must do something more and is holding back an amount, large or small, to secure full performance, there is no final settlement of the contract."

This decision and holding by the lower court is in conflict with the decisions of the Circuit Courts of Appeals in the following cases:

Consolidated Indemnity & Ins. Co. v. W. A. Smoot & Co., 57 F. (2d) 995 (C. C. A. 4th), Certiorari denied 287 U. S. 613; *United States to Use of Stallings v. Starr*, 20 F. (2d) 803 (C. C. A. 4th); *Antrim Lumber Co. v. Hannan*, 18 F. (2d) 548 (C. C. A. 8th); *United States for Use of R. Haas Electric & Mfg. Co. v. Title Guaranty & Surety Co.*, 254 Fed. 958 (C. C. A. 7th); *Robinson v. United States to the Use of Brown-Ketcham Iron Works*, 251 Fed. 461 (C. C. A. 2d); *United States ex rel. Brown-Ketcham Iron Works v. Robinson*, 214 Fed. 38 (C. C. A. 2d); *United States v. Thomas Earle & Sons*, 99 F. (2d) 898 (C. C. A. 3d); *United States v. Arthur Storm*, 101 F. (2d) 524 (C. C. A. 6th); *Fidelity & Casualty Company of New York v. United States*, 70 F. (2d) 895 (C. C. A. 6th); *H. G. Christman Company, et al., v. Michigan Gypsum Co., et al.*, 85 F. (2d) 474, 476 (C. C. A. 8th).

The Circuit Courts of Appeals in the above cited cases held "performance and final settlement" might take

place although the amount due the contractor was subject to change or a portion thereof was retained. The important thing for the purpose of suits under the Hurd Act was the date on which the department having charge of the work determines that it has been performed and determines the amount due the contractor and not the date on which minor disputes or matters of accounting are disposed of.

As examples to show that the decision of the lower court was in conflict with decisions of Circuit Courts of Appeals in other circuits, we find that in the *Smoot* case, *57 F. (2d) 995*, $39.69 was withheld awaiting "final adjustment".

In the *Thomas Earle* case, *99 F. (2d) 998*, $2729.72 was retained "pending adjustment of liquidated damages ($1829.72) and removal of sunken barge ($900.00)."

In the *Robinson* case, *214 Fed. 38, 40*, 15% of the contract price was retained to cover "overtime damages" and "omissions, defects and unfinished items". In all of the other cases above quoted under this point, amounts were retained to cover claims for liquidated damages or defects and omissions.

The Circuit Court of Appeals for the Second Circuit in the case of *Robinson v. U. S., 251 F. 461, 466*, in holding that minor disputes or the retention of the amount found to be due should not delay the date of final settlement pointed out:

> ". . . Any other construction would inevitably lead to the defeat of some of the essential purposes for which the statute was enacted. A subcontractor who had performed his work would be compelled to

wait for some indefinite period because some other subcontractor, or the main contractor himself by reason of some default or dispute, made necessary the reservation of a certain sum to make good that default or dispose of that dispute. It can readily be seen that in a contract involving, as did the contract at bar, over a million dollars, a subcontractor could be kept out of his money because of a dispute over a comparatively small sum, notwithstanding the fact that the government was satisfied to the point where it no longer looked to the surety bonds. Remembering that the purpose of the statute in this regard was to protect the United States, it follows that there is no merit in the contention that the subcontractor must wait to begin his action until disputes as to completion are finally settled, notwithstanding that the government on its part is entirely satisfied and approves the final settlement of the contract."

Be it noted that in the present case the contract was for the construction of a $1,178,000 building. On July 2, 1932, the proper officer of the government determined that the contract was completed and the building occupied by the government within the agreed time and likewise determined the balance due the contractor to be $4332.80, and directed the payment of all of this amount except $82.80. More than two years elapsed before this amount was paid. This amount was retained to cover the cost of replacement of a small opening in the wall which surrounded the Marine Hospital grounds and which was kept open by the contractor to move materials to another building which was being constructed by him under an-

other and different contract. The replacement of the wall *formed no part of the contract* and therefore the replacement of the wall had nothing to do with the "performance and final settlement" of the contract. Judge McCord was careful to point this out in his opinion. Yet, under the decision of the lower court, no laborer or materialman could have brought suit until this opening in the wall was closed.

We stated in the petition, "there is no dispute as to any fact bearing upon the date of final settlement". This statement is correct. The facts are that the date of final settlement as used in the Hurd Act is determined by either the letter of July 2, 1932, or the letter of July 28, 1934. The only dispute is the conclusion that flows from the findings and determinations made in these letters.

The main defense in this case is that the suit was filed too late.

We pointed out in the petition that the Circuit Court of Appeals, by its judgment (R. 288), has limited the trial on the remand to the issue of imputation and that if petitioner should be successful in maintaining this defense for the full amount claimed, it would still have a judgment rendered against it for at least $7500.00, plus interest. This clearly shows that unless relief is now granted by this Court, a judgment shall be rendered against it which is erroneous.

It is clear, therefore, that the Circuit Court of Appeals for the Fifth Circuit, in the decision below, has decided an important question of federal law in a way in conflict with the applicable decisions of this Court, and has created a conflict with the decisions of the Courts of Ap-

peals for six of the nine Circuits. Ever since the decision in the *Peeler* case, over thirty-four years ago, every Circuit Court of Appeals, with two exceptions, when this issue has arisen has followed the decisions of this Court in the *Peeler* and *Globe Indemnity* cases. The two exceptions are the decision in this case and the decision by the Court of Appeals for the Second Circuit in the *Globe Indemnity* case, *66 F. (2d) 302*, in which latter case this Court granted a writ of certiorari and reversed same.

Respectfully submitted,

JAMES C. HENRIQUES,
310 Union Building,
New Orleans, La.,
Attorney for Petitioner.

GORDON BOSWELL,
Of Counsel.